

**REMARKS/ARGUMENTS**

Re-examination and favorable reconsideration in light of the above amendments and the following comments are respectfully requested.

Claims 32 - 73 are pending in the application. All claims stand rejected.

By the present amendment, independent claims 32 and 72 have been amended and claims 35, 62, and 68 have been cancelled without prejudice.

In the office action mailed June 24, 2009, claims 32 - 39, 53, 56 - 69, and 72 - 73 were provisionally rejected on the grounds of nonstatutory obviousness-type double patenting as being unpatentable over claims 37 - 45, 48, 52, 58, 59, and 66 - 81 of copending Application No. 10/543,077 in view of PCT publication no. WO00/64769 to Dambricourt; claims 62 and 68 were rejected under 35 U.S.C. 112, second paragraph, as being indefinite; claims 32 - 45, 50 - 61, 66, and 70 - 73 were rejected under 35 U.S.C. 103(a) as being unpatentable over PCT publication WO/2001/068355 to Dambricourt in view of U.S. Patent No. 5,314,746 to Johnson et al. and Dambricourt '769; claims 46 - 49 were rejected under 35 U.S.C. 103(a) as being unpatentable over Dambricourt '355 in view of Johnson et al., Dambricourt '769, and U.S. Patent No. 3,839,890 to Phlippoteau; claims 67 and 69 were rejected under 35 U.S.C. 103(a) as being unpatentable over Dambricourt '355 in view of Johnson et al., Dambricourt '769 and U.S. Patent No. 5,372,863 to Nishikawa; and claims 63 - 65 were rejected under 35 U.S.C. 103(a) as being unpatentable over Dambricourt '355 in view of Johnson et al., Dambricourt '769, and PCT publication no. WO/2001/094213 to Doherty et al.

The foregoing rejections are traversed by the instant

response.

The Examiner and his SPE are thanked for the courtesy of conducting a personal interview with the undersigned attorney on October 19, 2009. During the interview, a demonstration was conducted to show the synergistic effect created by the invention of the present invention - namely a spring back or return effect which enables the tube of the present invention to be fully emptied. As pointed out to the Examiners, it is the combination of the form of the head, the wall thickness, and the nature of the polymer that leads to the tube of the present invention having an amplified return effect. This return effect is precisely described in paragraphs 0016 to 0019 and 0087 of the substitute specification previously filed in this case.

Further, during the interview the prior art used to reject independent claim 32 was discussed at length. It was agreed that one of ordinary skill in the art at the time of the invention would not look to the material of Johnson when forming a tube of the Dambricourt references.

Consonant with the discussion at the interview, Applicant has now amended the independent claims in this case to include the subject matter of claim 35 and a statement that the skirt and head are manufactured in a single piece.

With regard to the provisional obviousness type double patenting rejection, this rejection is now moot in view of the terminal disclaimer attached hereto.

With regard to the rejection of claims 62 and 68 under 35 U.S.C. 112, second paragraph, this rejection is now moot in view of the cancellation of these claims.

With regard to the rejection of claims 32 - 45, 50 - 61, 66, and 70 - 73 on obviousness grounds over Dambricourt '355 in combination with Johnson et al. and Dambricourt '769, this

rejection fails for the following reasons.

Claim 32 is directed to a fully emptiable tube provided with a wall resistant to stress-cracking and forming a water barrier, said tube comprising a flexible skirt and a head manufactured in a single piece, the flexible skirt being elongate in an axial direction and having, at one end of the tube, a filling end sealed by crushing the flexible skirt along a transverse direction and the head comprising at least one evacuation orifice and a flexible neck forming a radial extension of the at least one evacuation orifice and connecting with the flexible skirt, at least the flexible skirt and flexible neck forming a single-piece assembly, a wall at the joining of the flexible neck with the flexible skirt in a longitudinal plane containing the axial direction and perpendicular to the transverse direction having a determined joining radius, and the flexible skirt in a plane transverse to the axial direction and at mid-distance between an end of the flexible neck forming the at least one evacuation orifice and the filling end of the tube having a determined perimeter and a substantially constant wall thickness, the ratio of the determined perimeter to the joining radius being at least equal to 4.5, wherein the wall in the transverse plane has a median thickness of between 0.30 mm and 1.20 mm, wherein the tube consists of a mixture of a number "n" where n is at least equal to 1 of the polymers belonging to a family of copolymers-olefins prepared from  $C_2$  to  $C_{10}$  monomers, wherein at least a first polymer of the mixture belongs to the polypropylene family, and wherein the constituent mixture of the tube wall has a flexural modulus of no more than 700 MPa according to standard NF EN ISO 178 and wherein the first polymer is a heterophase copolymer of propylene and ethylene.

Claim 73 is directed to a method for fabricating a flexible, fully emptiable tube consisting of a skirt and a head comprising at least one evacuation orifice and a neck forming a radial extension of the orifice and being joined to the skirt, the skirt and the neck forming a single-piece assembly resistant to stress-cracking and forming a water barrier, comprising the steps of: using as constituent material of a wall of the tube a mixture of a number "n" where n is at least equal to 1 of polymers belonging to the family of copolymers-olefins prepared from C<sub>2</sub> to C<sub>10</sub> monomers, a first polymer belonging to the polypropylene family, wherein the first polymer is a heterophase copolymer of propylene and ethylene, the mixture of polymers having a flexural modulus of no more than 700 MPa, and the wall having a thickness of between 0.30 and 1.20 mm; and fabricating the skirt and head of the tube as a single piece by injecting the mixture, in a single injection operation, into an injection mould comprising an impression and a core, said core comprising a central part of which one free upper end center bears upon the impression at least during the skirt injection phase.

Neither the '355 nor the '769 PCT patent publications mentions the problem of lack of reversibility of a fully emptiable flexible base which undergoes deformation. Moreover, even if the '769 document discloses a preferred embodiment of a fully emptiable tube, provided with a wall resistant to stress cracking and forming a water barrier, the '769 document only gives a general designation of the material of the tube (thermoplastic material such as polypropylene).

The Johnson et al. patent discloses films of propylene-ethylene co-polymers (see claim 10 and the specification, col. 8, lines 3 to 5). According to the Johnson et al. specification in column 8, lines 16 to 20, these copolymers present a flexural

modulus, which ranges from 20,000 psi to 100,000 psi, and preferably from 40,000 psi to 70,000 psi, i.e. from 137.8 MPa to 689.7 MPa, and preferably from 275.9 MPa to 482.8 MPa. These propylene copolymers thus present high "hand" properties of softness and quietness and very high toughness (column 1, lines 61 - 62). These films are soft and pliant with a "cloth-like drape and feel" (see column 1, lines 64 - 65). Thus, these films are intended to be used for certain applications such as healthcare films, microwave bags, grocery bags, surgical drapes, etc. Johnson et al. makes no mention of using these materials as a flexible tube, nor a fully emptiable tube. Furthermore, the teachings in Johnson et al. clearly show that the polymer films are not appropriate for the production of fully emptiable tubes.

It is well settled law that the Examiner has the burden of establishing a *prima facie* case of obviousness. See *In re Rijckaert*, 9 F.3d 1531, 1532 (Fed. Cir. 1993). Obviousness requires a suggestion of all elements in a claim (*CMFT, Inc. v. Yieldup Int'l Corp.*, 349 F.3d 1333, 1342 (Fed. Cir. 2003)) and "a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does." *KSR Int'l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1741 (2007); also see *Ex parte Alexander*, 86 USPQ2d 1120, 1121 (BPAI 2007). As stated in *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006), there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.

An obviousness determination also requires that a skilled artisan would have perceived a reasonable expectation of success. See *In re O'Farrell*, 853 F.2d 894, 903-04 (Fed. Cir. 1988). However, to have a reasonable expectation of success,

one must do more than merely vary all parameters or try each of numerous possible choices until one possibly arrived at a successful result. The prior art fails to provide the requisite reasonable expectation of success where it teaches merely to pursue a general approach that seems to be a promising field of experimentation, and where the prior art gives only general guidance as to the particular form of the claimed invention or how to achieve it. See *O'Farrell*, at 903-04. The expectation of success must be founded in the prior art, not in the applicant's disclosure. *In re Dow Chem. Co.*, 837 F.2d 469, 473 (Fed. Cir. 1988).

Given the fact that the materials disclosed in Johnson et al. are unsuitable for forming fully emptiable tubes, the requisite reasonable expectation of success is not present. Thus, one of ordinary skill in the art would not be motivated to combine Johnson et al. with the primary reference and the Examiner has failed to make out a *prima facie* case of obviousness. While one can vary parameters or try each of numerous possible choices until one arrives at the claimed invention, this does not establish that the claimed invention is obvious because the references fail to provide the necessary guidance. Consequently, it is far from apparent that one of ordinary skill in the art would have highlighted the problem of lack of reversibility of a fully emptiable flexible tube which undergoes deformation. Again neither the '835 nor the '769 references mentions such a problem and/or a solution to it and the Johnson et al. reference only discloses soft films which are not suitable for the production of a fully emptiable tube.

Further, there is nothing in the prior art references, particularly Johnson, which would guide one how to achieve the return effect achieved by the tube of the present invention.

For these reasons, claims 32 and 72 are allowable over the cited and applied references.

Claims 33 - 45, 50 - 61, 66, 70, 71, and 73 are allowable for the same reasons as their parent claims as well as on their own accord.

With respect to the obviousness rejections of claims 46 - 49, 63 - 65, 67, and 69, these claims are allowable for the same reasons as their parent claims as well as on their own accord. The Phlippoteau, Nishikawa, and Doherty et al. references do not cure the aforementioned deficiencies of the Dambricourt patent documents and the Johnson et al. reference.

With respect to the terms AFFINITY and EXACT, these terms are only known to Applicant as trade names. Thus, the superscript TM has not been applied. It is also noted that these terms are used in CAPITAL LETTERS (see pages 15 and 16) and on page 16, the generic terminology is described. Applicant can not find any requirement in the patent rules that trade names must always be accompanied by the generic terminology. If the Examiner is aware of such a rule, he is requested to point it out to Applicant. One would think that just one such occurrence is sufficient for one of ordinary skill in the art to understand what is being discussed.

For the foregoing reasons, the instant application is believed to be in condition for allowance. Such allowance is respectfully solicited.

The instant amendment after final rejection should be entered since it reduces the issues for appeal and since, as agreed at the interview, it overcomes all of the rejections of record. No further search and/or further consideration is required on the part of the Examiner. The subject matter of all amendments have previously been searched by the Examiner. Still

further, it does not raise any issue of new matter.

Should the Examiner believe an additional amendment is needed to place the case in condition for allowance, he is hereby invited to contact Applicant's attorney at the telephone number listed below.

A request for a two month extension of time and a notice of appeal are enclosed herewith. The Director is hereby authorized to charge said extension of time fee in the amount of \$490.00, notice of appeal fee in the amount of \$540.00, and the terminal disclaimer fee in the amount of \$140.00 to Deposit Account No. 02-0184.

If any additional fees are required in connection with this case, it is respectfully requested that they be charged to Deposit Account No. 02-0184.

Respectfully submitted,

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